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**Supreme Court of the United States**

**OCTOBER TERM 1945**

No. **198**

M. KRAUS & BROS., INC.,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

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July 5, 1945.

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**TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES  
OF THE SUPREME COURT OF THE UNITED STATES:**

Your petitioner, M. Kraus & Bros., Inc., a New York corporation, respectfully applies for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered May 31, 1945 (R. 336), affirming a judgment of the United States District Court for the Southern District of New York (R. 290), entered after a jury verdict (R. 286-7) in a criminal prosecution for alleged violations of maximum price regulations issued under the authority of the Emergency Price Control Act of 1942. A certified copy of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38, paragraph 1 of the Rules of this Court.

## Opinions Below

The District Court rendered no opinion. The opinions of the Circuit Court of Appeals are not yet reported. The majority opinion is at R. 327-334. The dissenting opinion of Hincks, D. J., is at R. 334-5.

## Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 347(a)) and as modified, pursuant to the Act of March 8, 1934 (19 U. S. C., Sec. 688), by Rule XI of the Rules of Practice and Procedure after verdict in criminal cases (292 U. S. 661, 666).

## Questions Presented

(1) Is the mere selling of poultry, at the maximum price established by the Price Administrator under the Emergency Price Control Act of 1942, in conjunction with edible poultry parts, upon which no such price has been fixed, a criminal offense under the regulation of the Price Administrator which prohibits, without specifying "tying-agreements", the evasion of established maximum prices, irrespective of whether the intrinsic or market value of the edible poultry parts is as great or greater than the price charged therefor, when the purchaser has not requested that he be permitted to buy the poultry separately.

(2) Is the mere conditioning of the sale of poultry, which is sold at the maximum prices established by the Price Administrator under the Emergency Price Control Act of 1942, upon the purchase in conjunction therewith of edible poultry parts, for which no such maximum prices have been established, a criminal offense under the Act and

the regulation of the Price Administrator prohibiting the evasion of established maximum prices, without specifying "tying agreements", irrespective of whether the intrinsic or market value of the edible poultry parts is as great or greater than the price charged therefor.

(3) In a prosecution for conditioning the sale of poultry upon the purchase in conjunction therewith of edible poultry parts, in alleged evasion of such established maximum prices, is the intrinsic or market value of such parts or the demand therefor a material fact which the defendant is entitled to prove by disinterested witnesses, there being no claim that the poultry itself was sold in excess of the maximum prices established by the Price Administrator under the Emergency Price Control Act of 1942?

(4) When poultry, for which such maximum prices have been established, is sold at such maximum prices in conjunction with edible poultry parts, upon which no such prices have been established, does the determination of whether or not the criminal offense of wilfully violating the established maximum prices has been committed by an evasive method depend exclusively upon the usefulness of such poultry parts to the purchaser or does such a determination require the consideration of whether a price is charged therefor which is in excess of the intrinsic value or the fair market price?

(5) May a corporation be properly convicted for wilfully evading established maximum prices for poultry by conditioning the sale thereof upon the purchase of edible poultry parts in conjunction therewith, if the purchasers have dealt exclusively with salesmen and other subordinate employees of the corporation, and no proof is made that any of its officials had knowledge that the sale of the poultry was conditioned upon the purchase of the poultry parts, if such was the fact?

(6) When affidavits of witnesses called by the Government were shown by the prosecution to them for the ostensible purpose of refreshing their recollection, and parts thereof were read to them in this connection, in the presence of the jury, was it reversible error for the trial court to hold that it was not within his discretion to permit the attorney for the defendant to inspect the affidavits?

(7) Was it reversible error for the trial court to permit the prosecution in summing up to the jury to tell it that the maximum fine upon each count was \$1,000, whereas in fact it was \$5,000, and thereafter to impose a fine of \$2,500 upon each of the nine counts upon which verdicts of guilty were found?

### **Statute and Regulations Involved**

The Informations charged violations of Regulations of the Price Administrator under the Emergency Price Control Act of 1942 (Title 50, War, Appendix, U. S. C., Secs. 901-946, Act of January 30, 1942, Ch. 26, Title III, Sec. 306, 56 Stat. 37).

Section 902(a) authorizes the Price Administrator to establish by regulation maximum prices for commodities in furtherance of the purposes of the Act. Section 902(g) authorizes him to make regulations which he deems necessary to prevent the circumvention or evasion of established maximum prices.

Section 902(h) provides that such powers shall not be exercised "to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this act."



Section 904 makes it unlawful for any person to sell or deliver any commodity in violation of any regulation or order of the Price Administrator under Section 902. Section 925(b) provides that wilful violations of Section 904 shall be subject upon conviction to imprisonment and \$5,000 fine.

Pursuant to this authority, the Price Administrator fixed ceiling prices for poultry (Revised Maximum Price Regulation No. 269, effective December 18, 1942, amended March 16, 1943—Amendment 6) and promulgated a regulation in connection therewith as follows:

“Sec. 1429.5. *Evasion.* Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation or other charge, or discount, premium, or other privilege or other trade understanding or otherwise.”

### Statement

Petitioner is a wholesale dealer in meat and poultry. (R. 192-3). In 1943 it did a gross business of \$4,000,000 a year. Prior thereto its gross business ran from 7 to 7½ million dollars a year (R. 207). Two Informations (R. 3-13) were consolidated for the purposes of trial. Each count in both Informations charged the making of a sale of poultry in violation of Title 50 App. Sec. 901 et seq. United States Code, commonly known as the Emergency Price Control Act of 1942, and the regulations issued thereunder by the Price Administrator, specifically Sec. 1429.5 of Maximum Price Regulation 269, prohibiting the evasion of established maximum prices.



Max Kraus, the president of petitioner, (R. 207) was named as a co-defendant in the first Information, containing six counts. He was acquitted by the jury on all counts. (R. 286-7).

At the conclusion of the Government's case, Count 5 was dismissed. The petitioner was found guilty on the other five counts of the first Information. It was also found guilty upon Counts 3, 4, 5 and 6 of the second Information, but was acquitted on Counts 1 and 2 thereof (R. 286-7). The Court fined the petitioner \$2,500 on each of the nine counts upon which it was convicted (R. 290).

All of the counts in the two Informations are in the same form. Each charges that the petitioner, in connection with the sale on a specified date of a specified amount of poultry to a specified purchaser, and "as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions" of revised Maximum Price Regulation No. 269, Sec. 1429.5 "by demanding, compelling and requiring" the purchaser to purchase another commodity (variously specified as being chicken feet, chicken skin, or gizzards) at a specified price "as a condition of the sale to him of the aforesaid poultry."

None of the counts in either of the two Informations contained any allegation that the poultry was sold above the established maximum price, or that the poultry parts were sold above any such price, or that they were sold at a price in excess of their intrinsic or fair market value. All of the sales upon which convictions were obtained occurred in a three day period, November 22-24, 1943.

The Government called as witnesses a number of retail butchers as the purchasers named in the various counts. A number of them had themselves been convicted of maximum price violations (R. 57, 75, 96), and one (Abraham Mandel) had been given a jail sentence which was suspended (R. 57).

None testified that he had asked to buy poultry without purchasing poultry parts. There was no competent testimony believed by the jury that any officials of the petitioner had had anything to do with the alleged conditioning of the sales, the dealings having been exclusively with salesmen or other subordinates (R. 69-71, 81-2, 85, 89, 101, 114, 128-9, 149, 168, 171). Only one (Abraham Mandel, who had received a suspended jail sentence) claimed that the sale of the poultry to him was conditioned upon the sale of poultry parts in conjunction therewith, and even he did not testify that he asked that the poultry be sold to him separately. He likewise specifically denied compulsion to buy (R. 50). The jury acquitted upon both of the counts which were rested upon his transactions (R. 8-9, 286-7).

The Government proved the number of pounds of poultry sold to each purchaser and the price charged therefor. In no case was it claimed that more than the established maximum price was charged. The Government also proved that an employee of the petitioner, at the time of selling the poultry to each of the purchasers, offered each of them a limited amount of chicken-feet, chicken skin or gizzards, and that in all the transactions upon which verdicts of guilty were returned the purchaser accepted the offer, without demur, and paid the price asked therefor.

No proof was offered to the effect that any established maximum price was in existence for any of the poultry parts except gizzards, and in the case of these it was stipulated that they were sold below the ceiling price (R. 49).

Although it was not so alleged in either of the Informations, the Government took the position at the trial that chicken feet, chicken skin and gizzards were substantially worthless (R. 280).

When two of its witnesses (Max Braverman and Harry Moseowitz) did not testify to the satisfaction of the Government, the prosecutor marked for identification (R. 105, 132) affidavits previously made by them and purported to refresh their recollection with them, by showing them to

the witnesses and reading certain parts thereof in the presence of the jury, but when counsel for the defendant demanded the right to inspect the affidavits, the trial court ruled (R. 107):

"I haven't been exercising any discretion. I would hold that the United States had an absolute legal right to insist on doing precisely what it has done. I will deny your application, which I understand is for permission to read what the witness has read."

At the conclusion of the Government's case the defendant moved for directed verdicts on each count, and the motion was denied, except as previously stated, the defendant excepting (R. 183-7).

At the outset of defendant's case counsel put on two witnesses and proposed to call many more to testify to the market for poultry parts, such as gizzards, chicken skin and chicken feet, and the value thereof therein. The trial court sternly and peremptorily directed him not to make such proof (R. 191) on the ground that no such issue was in the case (R. 190), and exception was duly taken (R. 190). As the dissenting judge points out, this ruling, which he considered reversible error (R. 334-5), remained in effect throughout the case (R. 335).

Numerous character witnesses of high standing in the packing and wholesale meat business testified to the excellent reputation of Max Kraus for truth, veracity and abstinence from "black market" violations. One, a vice-president of a bank, testified he knew of no one with a better reputation (R. 259). No attempt was made to impeach any of these witnesses. (R. 250-262).

At the end of the case the defendant again moved for directed verdicts, and motions were denied, with exceptions (R. 263-4).

Summing up to the jury the prosecutor told it that \$1,000 (R. 270) was the maximum fine on each count, whereas in fact it is \$5,000.

Charging the jury the trial court told it that the excluded evidence concerning the market value of poultry parts was "claptrap" and "poppy cock" (R. 274), to which exception was duly taken (R. 284). He also charged that to create a reasonable doubt the character evidence would have to be so strong as to contradict the positive or the circumstantial evidence in the case (R. 278).

### **Specification of Errors to be Urged**

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that verdicts ought not to have been directed by the trial court in favor of petitioner.

(2) In holding that the jury was justified in finding beyond a reasonable doubt that petitioner was guilty of the offenses alleged in the counts upon which it was convicted.

(3) In holding that under the evidence petitioner resorted to an illegal device to evade the maximum price ceilings upon poultry.

(4) In holding that the trial court did not commit reversible error in excluding the evidence offered by petitioner to prove the market demand and price of poultry parts.

(5) In holding that it was not reversible error for the trial court to refuse counsel the right to inspect the affidavits of certain Government witnesses which were shown to said witnesses for the purpose of refreshing their recollection and parts of which were read to the witnesses in the presence of the jury.

(6) In holding that the petitioner was properly convicted for the acts of its salesmen and its subordinate employees not brought home to any of its officials.

(7) In holding that it was not reversible error for the trial court to permit the prosecution, in summing up to the jury, to tell it that the maximum fine upon each count was \$1,000, whereas in fact it was \$5,000, and thereafter to impose a fine of \$2,500 upon each of the nine counts upon which verdicts of guilty were found.

### **Reasons for Granting the Writ**

(1) Prior to the enactment of the Emergency Price Control Act of 1942 it is common knowledge that it was customary in many industries to make combination offers, that is, to offer to sell a product in great demand in conjunction with some other slower moving product. This practice is peculiarly appropriate when the product offered for sale in conjunction with the principal product is a by-product thereof, as in the case of poultry and poultry parts. It is likewise peculiarly appropriate during times when the main product is scarce, and complete utilization of its by-products or substitute products is desirable in the public interest, for example, ice cream and sherbet.

No proper claim can be made that chicken gizzards, chicken skin and chicken feet are not edible products, useful in themselves. If no more than the intrinsic or fair market value of the secondary product is asked by the seller, so that no claim can be made that the sale of the secondary product was made at a fictitiously exaggerated price, and particularly if the buyer has not requested that the primary product be sold to him separately, it is difficult to understand how evasion of maximum price regulations can be claimed. The point is raised very sharply in this case because of the trial court's exclusion of all evidence on the part of disinterested witnesses on behalf of the defendant as to the intrinsic or market value or demand for poultry parts (R. 188-192, 48).

It is respectfully submitted that upon such a prosecution the most material element in the case is the true worth or fair market value of the by-product, particularly in view of the caveat in Section 902(b) against compelling changes in business practices. In forbidding the petitioner to prove this fact by disinterested witnesses, it is submitted that the trial court so far departed from the accepted and usual course of judicial proceedings, and the Circuit Court of Appeals for the Second Circuit so far sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision. *Crawford v. U. S.*, 212 U. S. 183, 203.

In addition thereto, the exact conditions under which combination sales are to be regarded as evasive of established maximum prices presents a question of great public importance, which ought to be authoritatively decided by this Court, in view of the fact that current conditions of scarcity have brought into more extended use the combination sale whereby a more plentiful but nevertheless useful article is offered in conjunction with the sale of a scarce article.

(2) Under the current conditions of scarcity in the food market it will inescapably happen that employees, without authority from their employers, will on occasions violate established maximum prices in order to accommodate certain of their regular customers. It is respectfully submitted that their wilful but casual\* violations of law are not properly attributable to their employers without bringing home knowledge thereof to them. An employer instructs employees to sell the goods in stock. There is not enough to

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\* Less than \$200 worth of poultry parts were involved in the counts upon which the jury convicted. All were sold between November 22, 1943 and November 24, 1943. This is to be compared with average 3 days sales of about \$40,000 in meats and poultry.



go round of certain goods. Of others there is a plentiful supply. How is the employer to necessarily know that on occasions his employees have conditioned the sale of the former on the latter?

It is respectfully submitted that the holding of the Circuit Court of Appeals affirming the refusal of the trial court to direct verdicts for petitioner is contrary to the principles announced in *Lake Shore & Michigan So. Ry. Co. v. Prentice*, 147 U. S. 101, *The Amiable Nancy*, 3 Wheat. 546, and *Washington Gaslight Co. v. Lansden*, 172 U. S. 534; also *John Gund Brewing Co. v. U. S.* (C. C. A. 8th) 204 Fed. 17, at pp. 23-24; *U. S. Food & Grocery Bureau of So. Cal. Inc.*, 43 Fed. Supp. 966 (key nos. 5-9); *U. S. v. Corlin*, 44 Fed. Supp. 940 (key nos. 10 and 12); *Grant Bros. Construction Co. v. U. S.*, 114 Pac. 955, 12 Ariz. 388, affd. 232 U. S. 647. In view of this apparent conflict and the desirability of clarifying the law in respect of the principal's liability for acts of its subordinate agents in wilful violation (as assumed) of regulatory statutes, it is respectfully requested that certiorari be granted upon this question.

(3) In *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, at pages 231-237, this Court discussed the proper methods to be employed in refreshing a witness' recollection by prior sworn statements. In the particular case it held that no reversible error had been committed. In this case, the trial court arbitrarily held that it was not required to exercise any discretion in passing upon the demand of counsel for the petitioner that he be permitted to examine affidavits being shown to witnesses and in part read to the jury.

It is respectfully submitted that in so doing the trial court acted in conflict with this Court's decision in the foregoing case, and that it so far departed from the accepted and usual course of judicial proceedings, and that the Circuit Court of Appeals for the Second Circuit so far sanctioned such departure by the trial court, as to call for an exercise of this Court's power of supervision.



(4) In a number of recent cases, *Berger v. U. S.*, 295 U.S. 781, 784-789, *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, at pp. 237-243, and *Viereck v. U. S.*, 318 U. S. 236, this Court has had occasion to consider allegedly improper action on the part of the prosecution in summing up to the jury. When a jury is told by the prosecutor, as it here was, that the maximum fine which can be imposed is one-fifth of what it actually is, it is respectfully submitted that there is presented a matter of sufficient public importance for this Court to determine whether this constitutes reversible error.

### Conclusion

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

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July 5, 1945